80-1297
NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Jacqueline Marcello Dugas,
Petitioner

versus

Jerry W. Kelly,
Respondent

Consolidated with

Carlos Marcello,
Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FOR THE RESPONDENT

QUESTIONS PRESENTED

1.

Whether a Writ of Certiorari may be properly granted to an applicant who cannot show that the decision of the court of appeals is in conflict with any decision of any other court nor that it has so departed from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

2.

Whether a Writ of Certiorari should be granted to an applicant who does not contest the substantive result in the court of appeals, where the only error alleged was a procedural one without effect on the outcome of the case, and where the benefits of the Writ, if granted, flow only to the applicant's counsel and not to the applicant herself.

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STATEMENT OF THE CASE

This action was filed by Jerry W. Kelly, plaintiff below and opponent herein and tried before the United States District Court for the Eastern District of Louisiana. The trial, by stipulation, was limited to the issue of liability and left the issue of quantum of damages for later determination.

On June 18, 1980, the Honorable Veronica D. Wicker entered Findings of Fact and Conclusions of Law and, on July 15, 1980, entered judgment in accordance with those Findings and Conclusions. That judgment cast Mrs. Dugas, defendant below and petitioner herein, in judgment to Jerry Kelly, but, due to the limitations upon the scope of the trial stemming from the stipulations upon which trial was had, did not assess damages. The judgment therefore constituted a partial judgment

upon the issues between the parties.

Counsel for the defendant, Mrs. Dugas, duly filed a Notice of Appeal, apparently having overlooked the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. That Rule provides that partial judgments are not appealable, absent certain procedural formalities; it is undisputed that those formalities were not observed in this instance.

Mrs. Dugas's counsel wrote to the clerk of the court of appeals, requesting an extension of time in which to order the transcript of the record in the trial court. That letter did not arrive at the office of the clerk before that officer, acting pursuant to Rule 10(b)(4) of the Federal Rules of Civil Procedure, dismissed the appeal for want of prosecution.

Mrs. Dugas's counsel then filed a motion to reinstate the appeal so dismissed; that motion was denied by the court of

appeals. From that denial, Mrs. Dugas's counsel seek review by means of the instant application for a Writ of Certiorari. As admitted in that Application, they do not seek to alter the substantive result in the court of appeals; rather, they seek merely to have this court take jurisdiction, have the record sent up from the court of appeals, and then have this Court issue an order altering the grounds upon which the court of appeals's denial was entered. (Applicant's Petition at 6.)

No right or interest of Mrs. Dugas or of her father will be advanced by such a order. No additional avenue of review or additional opportunity in litigation will be afforded thereby.

SUMMARY OF THE ARGUMENT

The relief sought in Mrs. Dugas's application is inappropriate. The petition does not set forth any ground for the exercise of this Court's supervisory jurisdiction other than a mild preference for one ground of denial below over another. The petition is utterly bare of any suggestion that might comport with the requirements of Rule 17 of the Rules of this Court, where the grounds for discretionary review are set forth. A petitioner's preference is not among those grounds.

Even if the petition made out a case for discretionary review under Rule 17, the jurisprudence of this Court and of the other federal courts does not support an applicant's right to set up a jurisdictional defect when seeking review from a court which that applicant selected and

where there is no substantive benefit to the applicant.

Rather, the only exception to judicial estoppel that an applicant may plead to permit him or her to aver his own error of jurisdiction has been used solely where there has been a substantive result which would be reversed by a dismissal for want of jurisdiction. This Court has never recognized a need to reverse for want of jurisdiction below where that want of jurisdiction has been harmless error. No such trivial rule should be instituted now.

ARGUMENT

The petition sets forth no ground for the exercise of this Court's supervisory jurisdiction.

The grounds for the exercise of discretionary review by this Court are set forth in Rule 17 of the Rules of this Court, which provides in pertinent part:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for

> an exercise of this Court's power of supervision.

R. Sup. Ct. of the U.S., R. 17.

The substance of Mrs. Dugas's petition may be found in two paragraphs:

> In 1804 this court established the principal that a party may assign for error, the lack of jurisdiction in the court to which he has resorted. Capron v Van Noorden 6 U.S. (Z. Cranch.) 126 (1804). [Sic.]
>
> Counsel has no quarrel with the dismissal of his abortive appeal, but respectfully petitions the Court to grant such dismissal on the grounds of prematurity and/or lack of jurisdiction rather than for want of prosecution and failure to order the transcript.

(Applicant's Petition at 5-6.)

The first point does not constitute a ground for the exercise of discretion; rather, it pretends to provide a jurisprudential authority for the exercise that the applicant seeks. The second point no more provides a ground; rather, it is a reiteration of the applicant's prayer for the exercise of that discretion,

reasons for which are not shown.

Nowhere in the applicant's petition is there even a suggestion that the decision of the court of appeals in this case was in conflict with any decision of any other federal court of appeals. No more is there any suggestion that the court of appeals decided a federal question in a way in conflict with a state court of last resort; indeed, as jurisdiction below was founded in diversity of citizenship, there was no federal question of any sort raised before the trial court. Rather, the issues at trial were solely issues of Louisiana state law.

Again, there is no suggestion that the decision of the court of appeals in this case departed from the accepted and usual course of judicial proceedings in any particular, let alone so far departed as to invoke this Court's supervisory

jurisdiction. In fact, a dismissal by a court of a case lodged upon its docket and upon grounds set forth in mandatory terms in its rules is specifically and undeniably within "the accepted and usual course of judicial proceedings".

The criteria for "special and important reasons" for review under Rule 17 were set out in this Court's decision in Rice v. Sioux City Cemetery, 349 U.S. 70 (1954) (concerning the predecessor to the current Rule 17, old Rule 19):

> This Rule ... embodies the criteria ... by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1925....
>
> ...
>
> A ... question raised by a petitioner may be "of substance" in the sense that, abstractly considered,

> it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [Citations omitted.] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.
>
> ...
>
> ... In the words of Mr. Chief Justice Taft, speaking for a unanimous Court:
>
> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the circuit courts of appeal." [Citations omitted.]

Rice v. Sioux City Cemetery, 349 U.S. 70, 73-79 (1954) [emphasis supplied].

The reasons advanced by the applicant herein are self-confessedly for the sole benefit of one party litigant, and without

significance of any sort for the public or for the development of the jurisprudence of this Court.

The error alleged in the petition was harmless error because even the grant of the relief sought would afford the applicant no substantive benefit and would work no change in her posture before the courts.

The applicant cites Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804) for the proposition that a litigant may raise on appeal a jurisdictional defect in a court to which the litigant himself chose to resort. (Applicant's Petition, at 5.) A review of that case, however, reveals that the petitioner there lost in the trial court and sought a reversal of the trial court decision. That reversal would necessarily reverse the positions of the parties after judgment,

conferring a substantive (and substantial) benefit upon the petitioner. The subsequent history of the Capron doctrine is ably reviewed in Mr. Justice Matthews's opinion in Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379 (1884). Notably, in each of the cases there listed in which the Capron rule was invoked to prevent a petitioner's application from being rejected, the petitioner in question stood to gain some substantive benefit from the denial of jurisdiction to the trial or intermediate appellate court. In other words, in each case the applicant lost his cause below and sought to reverse that loss through a declaration that the trial court lacked jurisdiction of the matter.

That is to be contrasted with the case at bar, where the petitioner admits that no substantive result will follow, but wishes this Court to work a trivial amendment to the record in the Court of

Appeals.

CONCLUSION

For the reasons set out above, Jerry W. Kelly, through undersigned counsel, respectfully prays this Court to deny the applicant's Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROSS P. LeDART, one of the counsel for Jerry W. Kelly, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1981, I served copies of the foregoing Brief in Opposition to Petition for Certiorari on the Petitioner herein, by placing three (3) copies in the United States Mail, first-class postage prepaid, properly addressed to her attorneys of record:

J. Thomas Nelson, Esquire
Richard G. Vinet, Esquire
NELSON, NELSON & KOCH, LTD.
144 Elk Place, Suite 1202
New Orleans LA 70112.

Harvey, Louisiana, this 2nd day of March, 1981.

/s/ Ross P. LaDart
ROSS P. LeDART

ENTRY OF APPEARANCE

I, ROSS P. LeDART, a member of the Bar of the Supreme Court of the United States, do hereby appear in the matter entitled "Jacqueline Marcello Dugas, Petitioner, versus Jerry W. Kelly, Respondent", a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ROBERT J. SKINNER, a member of the Bar of the Supreme Court of Louisiana and of the Bars of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit, from which this cause arises, is associated with me on this brief.

/s/ Ross P. LaDart
ROSS P. LeDART

CERTIFICATE OF FILING

STATE OF LOUISIANA)
) SS.
PARISH OF JEFFERSON)

I, ROSS P. LeDART, one of the attorneys for Jerry W. Kelly, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1981, I deposited in a United States post office, located at New Orleans Louisiana, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Brief in Opposisiton to Petition for a Writ of Certiorari.

/s/ Ross P. LaDart
ROSS P. LeDART

Subscribed and sworn to before me, this 2nd day of March, 1981.

(S E A L)

/s/ J. A. Hollister
NOTARY PUBLIC